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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

APPENDIX TO THE BRIEF FOR APPELLANT.

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EXCERPTS FROM 88 CONGRESSIONAL RECORD VOLUME III.

Proceedings in the Senate, April 7, 1942.

(p. 3387)

"The Presiding Officer. The amendment should be read as set forth in the notice.

The Chief Clerk read as follows:

Sec. 403 (a) For the purpose of this section • • •

(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period when the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) *any amount of the contract price which is deemed by the Secretary to represent excessive profits* and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period when the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is *deemed by the Secretary* to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department, (1) to require the contractor to renegotiate the contract price, (2) to withhold from the contractor any amount of the contract

price *which is deemed by the Secretary* to represent excessive profits, and (3) in case any amount of the contract price *deemed by the Secretary to represent excessive profits shall have been paid to the contractor.* * * *

SCHEDULE OF MAXIMUM PROFITS RATES.

Ten per cent of so much of the contract price as does not exceed $100,000 plus.

Eight per cent of so much of the contract price as exceeds $100,000 but does not exceed $500,000; plus

Six per cent of so much of the contract price as exceeds $500,000 but does not exceed $1,000,000; plus

Five per cent of so much of the contract price as exceeds $1,000,000 but does not exceed $5,000,000; plus

Four per cent of so much of the contract price as exceeds $5,000,000 but does not exceed $20,000,000; plus

Three per cent of so much of the contract price as exceeds $20,000,000 but does not exceed $50,000,000; plus

Two per cent of so much of the contract price as exceeds $50,000,000.

Proceedings in the House of Representatives
April 21, 1942

(p. 3582)

The Speaker. The Clerk will report the next amendment in disagreement.

The Clerk read as follows:

Amendment No. 74: Page 47, line 12, strike out all of lines 12 to 19 inclusive and insert in lieu thereof the following:

'Sec. 403. (a) For the purpose of this section, the term "Department" means * * *

(p. 3582)

'(c) The Secretary of each Department is authorized and directed, whenever in his

(p. 3583)

opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department, (1) to require the contractor *to renegotiate the contract price*, (2) to withhold from the contractor any amount of the contract price *which* is deemed by the Secretary to represent excessive profits.' • • •

(p. 3583)

Mr. Cannon of Missouri. Mr. Speaker, I move that the House recede from its disagreement to the amendment of the Senate numbered 74 and agree to the same with an amendment, as follows:

In lieu of the matter inserted by such amendment, insert the following:

'Sec. 403. (a) For the purposes of this section, the term "Department" • • •

'(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) *to require the contractor or subcontractor to renegotiate the contact price*, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found *as a result of such renegotiation* to represent excessive profits, and (3) in case any amount of the contract price found *as a result of such renegotiation* to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor.' • • •

(p. 3585)

Mr. Vinson of Georgia. • • •

The House itself started this legislation by adopting a profit limitation which I think everyone will agree is unworkable, and if left in the bill would probably have more harmful results than good. I say that in deference to the sincerity of the distinguished gentleman from South Dakota. The Senate struck out the House limitation and inserted a provision seeking to deal with excess profits through renegotiation of contracts. This provision was defective in that it also sought to deal with the problem of excessive profits on a contract basis without regard to the contractors' net profits for the year. It also was unacceptable in that it delegated to the various department heads the absolute and unlimited authority to determine what constituted excessive profits, without providing any standards for the assurance of the contractor and the guidance of the department head.

The conferees are bringing before the House a substitute which amends the Senate provision and leaves the question of excessive profits to be determined *entirely by mutual agreement of the contractor and the department* concerned through renegotiation of the contract. *This is no more nor no less than a restatement of existing departmental practice.*

The Naval Affairs Committee has given a great deal of study to the question of excessive war profits. It now has under consideration a bill which I feel deals more adequately, effectively, and comprehensively with this subject of war profits. These hearings have established that any plan for the recapture of excessive profits on war contracts, first, must contain ample authority to reach excessive profits of uncooperative contractors; second, must establish fair and reasonable standards for the as-

surance of the contractor and the guidance of the department head; third, must provide uniformity of treatment for all persons under substantially the same circumstances; and, fourth, must allow a fair return to the contractor on an annual basis.

None of the proposals before the House today meet these requirements. * * *

Mr. Tarver. Mr. Speaker, will the gentleman yield?

Mr. Vinson of Georgia. I yield to the gentleman from Georgia.

Mr. Tarver. If the gentleman's statement is correct—and I may say I am in full accord with him—then why should the House go through the futile motion of adopting this amendment? Why not reject the whole thing rather than have the people of the country believe we are undertaking to legislate on this question, when we are, in fact, not accomplishing anything?

Mr. Vinson of Georgia. That is a very practical question. Here is an appropriation bill involving some $19,000,000,000. The Army and Navy demand that it be passed as speedily as possible. * * *

(p. 3595)

Mr. Case of South Dakota. * * *

(p. 3596)

Now, then, I certainly hope that the Naval Affairs Committee, or some committee, does come in and give the Congress an opportunity to redeem the promise that every Member here has made at some time to his constituency, that he is in favor of taking the profits out of war. Let us not suggest to anybody that this amendment really does that. It does not go that far. It merely gives the departments an opportunity to renegotiate before final payment has been made. * * *"

Proceedings in the Senate, April 23, 1942

(p. 3648)

"The President pro tempore. The Chair lays before the Senate a message from the House which will be read.

The Chief Clerk read as follows:

• • •

That the House recede from its disagreement to the amendment of the Senate numbered 74 to said bill and concur therein with an amendment as follows: In lieu of the matter inserted by said amendment insert:

'Sec. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.' For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract,' and the term "contractor" includes a subcontractor—

"(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods, when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such

subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the conract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

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(pp. 3649-3650)

Mr. Vandenberg. In the process of renegotiation to which the Senator refers, what is the objective? Is there any criterion or yardstick?

Mr. McKellar. There is no yardstick except as to excessive costs. Let me read the amendment to the Senator. The first subdivision covers definitions, and it is not necessary that I read that. The second subdivision reads:

(b) The secretary of each department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount

of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract—

This applies not only to contracts but to subcontracts—as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such secretary and the subcontractor.

In other words, it is left to the Secretary of War, as to military contracts; the Secretary of the Navy as to naval contracts; or to the Maritime Commission as to maritime contracts—

Mr. Vandenberg. To determine what is an excessive profit?

Mr. McKellar. To determine what is an excessive profit. The contention that there should be a percentage limitation was not agreed to, because it was believed by these three departments that if a general percentage reduction were established, it would slow down production.

• • •

(p. 3650)

Mr. Vandenberg. Does the conclusion of the Government department as to what is an excessive profit become binding on the contractor, or must there be an agreement between the department and the contractor?

Mr. McKellar. The contract has to be renegotiated, but it will be seen that the head of the department has a tremendous—

Mr. Vandenberg. Leverage?

Mr. McKellar. Leverage; and I believe he will exercise it properly in all cases; indeed, I think it will mean the saving of tremendous sums.

Mr. Vandenberg. I think it has already had that result, through the renegotiation of other contracts; but what I am trying to establish is the fact itself, and the fact is, as I understand, that the identification of an excessive profit will require the consent of the contractor.

Mr. McKellar. Of course.

• • •

(p. 3650)

Mr. Overton. I wish to ask the Senator from Tennessee whether the amendment adopted by the Senate armed the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission with the authority, in the renegotiation of a contract, to determine what excess profits there are, and whether it gave the United States Government the right to retain any excess profits found by these officers, or the right to sue for excess profits found to exist by the officers concerned?

Mr. McKellar. That is entirely true.

Mr. Overton. That is what the Senate amendment provided?

Mr. McKellar. That is entirely true.

Mr. Overton. The substitute amendment proposed by the conferees takes that authority from the Secretaries, denies the Federal Government the right to sue for any excess profits which the secretaries may find, and gives the Federal Government th right of recovery, either by retention or recapture of excess profits, only when the contractor himself agrees that there has been an excess profit. There must be a meeting of the minds. A contractor himself must admit, by signing a renegotiated price agreement, that he has made excess profits, before the Federal Government has any right either of retention or of recovery.

Mr. McKellar. The Senator is correct. That amendment was made in the conference.

Mr. Taft. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Taft. I question the statement made by the Senator from Louisiana.

Mr. McKellar. He is in part correct, and in part not entirely correct, as I shall explain; but I yield to the Senator.

Mr. Taft. I only wished to suggest that the words "to negotiate" are ambiguous. Ordinarily they would seem to imply that a renegotiation could not be reached unless both sides should agree. Section 403 (a) provides:

> the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

So it seems to me clear that this proposal is to give absolute power to the secretary to reopen any contract and to fix any price he sees fit to fix.

Mr. Overton. Mr. President, will the Senator further yield?

Mr. McKellar. Let me say a word, and then I will yield to the Senator.

The committee was convinced that the word "renegotiate" would imply such authority in the first place; but we sought to remove all doubt by putting in the definition of "renegotiation" the power to fix the contract price. So it seems to me that while there must be a negotiation in every case between the contractor and the Government, in the end the Government has the right to fix the amount of profit and to withhold excess profits. In my opinion the result is one of the most helpful measures which we could pass.

I now yield to the Senator from Louisiana.

Mr. Overton. I do not think there is any doubt what-

soever as to the construction placed by the conferees on the proposed substitute. As the Senator will recall, in the conference it was insisted that the authority of the Secretary to determine what excess profits existed, should be taken away from him, and that no contractor should be made liable unless he himself agreed that there was an excess profit. So, in order to achieve that result, this one clause was inserted throughout the provisions of the substitute—

Mr. McKellar. From what section is the Senator reading?

Mr. Overton. It occurs throughout the section. It is provided that there shall be a provision in each contract for the retention by the United States or the repayment to the United States of—

> any amount of the contract price which is found as a result of such renegotiation to represent excessive profits.

That was substituted for the words:

> any amount of the contract price which is deemed by the Secretary to represent such excessive profits.

It was proposed in the conference that after the word "found" there should be inserted the words "by the Secretary." That proposed amendment to the substitute was rejected because it was the purpose of the conference that there should be no recovery on the part of the Federal Government unless the contractor himself agreed, in a contract of

(p. 3651)

renegotiation, that excess profits had been obtained by him or were likely to be obtained.

Mr. McKellar. I distinctly remember that the Senator from Louisiana offered an amendment to insert the words "by the Secretary." In my judgment, those words were

left out because they were immaterial. They would leave the contractor out entirely. He ought to be included. Provision was made to renegotiate and to refix the price according to the definition of "renegotiation"; and we felt that the practical effect of what we adopted would be to give the Secretary the right, in the end, to force his way. He would have the whip hand. No contractor would disagree over a matter if he knew that that would end his business. In my judgment, the provision is very much better as it is than it would be if the words "by the Secretary" were inserted.

Mr. Vandenberg. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Vandenberg. The Senator is now saying that the Secretary would have collateral powers of persuasion to affect the conclusion. Of course, that is undoubtedly true; but what is the textual fact in respect to the conference report? My original question has been answered both ways.

Mr. McKellar. I have not answered it both ways.

Mr. Vandenberg. The question is, Is the consent of the contractor necessary in order to identify an excessive profit? The Senator from Louisiana says "Yes." The Senator from Ohio says "No." The Senator from Tennessee says "Yes and no." What is the answer?

Mr. McKellar. I do not say "Yes and no." I say that the practical effect of the provision would be, first, to cause a renegotiation and an agreement, if possible. In the event there should not be an agreement, under this provision the Secretary would be required to take further steps. What would he do? He would fix the amount of the excessive profits and would withhold payment. Then it would be a matter for the courts to decide. It will be

remembered that when the amendment was originally before the Senate the distinguished Senator from Connecticut (Mr. Danaher) called attention to the fact that the bill contained a provision which would prohibit a contractor from going into the courts. As a result of the amendment of the Senator from Connecticut, that provision was stricken out. When it was stricken out, the language was left in such shape that the Secretary could pass upon the question, and if the contractor did not like the decision of the Secretary, he could go into court and endeavor to have it overruled.

The Senator from Michigan says that I answered "Yes and no." I think the Senator is mistaken. If I answered "Yes and no," I was mistaken. I am not in the habit of answering "Yes and no" to anybody. I answered in accordance with my understanding. In this case I know I am right, because if the Secretary holds, with respect to any contract, that a certain amount of profit should be regarded as excessive, he has the right to enforce his decision by withholding payment from the contractor, and the contractor may then go into court and have the matter settled.

Mr. Vandenberg. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Vandenberg. The answer is that the consent of the contractor is not required to identify an excessive profit, although one of the conferees says it is.

Mr. McKellar. He is required to negotiate. Two negotiators may differ.

Mr. Vandenberg. Just as the conferees seem to differ at the moment.

Mr. McKellar. Yes; but the Secretary has the right to pass upon the question in the way I have explained.

Mr. Overton. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Overton. I wish to quote the exact language of the substitute amendment suggested by the conferees in that connection. I call the attention of the Senator from Michigan to what I am about to read. I think there will be no question whatever as to what the answer to the question propounded by the Senator from Michigan should be.

Mr. Vandenberg. Does the Senator mean that the Senator from Tennessee is mistaken in his construction?

Mr. Overton. In my opinion he is mistaken.

Mr. Vandenberg. The Senator from Louisiana was one of the conferees on this bill, was he not?

Mr. Overton. I was one of the conferees. It is not a question of what the Senator from Tennessee or the Senator from Louisiana thinks. The language is so clear as to remove any doubt whatsoever as to the construction which should be placed upon it.

Mr. Vandenberg. If it does not remove the doubt of the Senator from Tennessee I do not know why it should be expected to remove the doubts of the taxpayer, who must live under this formula.

Mr. Overton. If the Senator from Michigan will withhold any comments until I can place before his clear and analytical mind the exact provision, he may arrive at an independent judgment, which I am sure will be correct. The language to which I refer is:

> (c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any

amount of the contract price which is found as a result of such renegotiation to represent excessive profits.

He may not withhold any amount representing excess profits unless those excess profits have been found as a result of the renegotiation between the contractor and the Secretary. So it is perfectly obvious that it must be by mutual consent.

Mr. Vandenberg. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Vandenberg. It seems to me that the Senator's statement is very persuasive; yet he seems to be overruled by the majority of his colleagues who joined in writing the formula. I was wondering if we could not give the ultimate taxpayer a little more assurance as to what are his rights and whether the Senate cannot know whether it is limiting profits.

Mr. McKellar. I do not think there is any doubt about the right of the contractor. If the contractor is displeased with what is done he may go into court and sue the Government for the money. That is provided in this bill or in other laws. If the Government is dissatisfied it can retain the alleged excessive profits. The Secretary can withhold payment. It is a very effective measure.

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(p. 3652)

Mr. Shipstead. I wish to ask only one or two questions. Is any definition of excess profits contained in the report?

Mr. McKellar. No; and there ought not to be. We do not want to put in the bill anything that will slow down production. It is one thing to prevent or recover any excess profits, but we do not want to slow down production. The Departments were of the opinion that this

provision would not slow down production, but would save excessive profits. That is why we have agreed to it.

Mr. Shipstead. Then, as I understand, decision as to the question of excess profits is left entirely to the conscience of the Secretary. Is that correct?

Mr. McKellar. The conscience of the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission.

Mr. Shipstead. Is it not a fact that the fixing of excess profits will be done according to the consciences of the various Secretaries?

Mr. McKellar. Yes, sir; that is correct.

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(p. 3652)

Mr. Danaher. At that time, obviously, they may agree or they may fail to agree. If they do agree, then subclause (2) comes into effect in the event the contract has not already been completed. Is not that so?

Mr. McKellar. I do not think the Senator has correctly interpreted that provision. It is true that the contractor or subcontractor may be required to renegotiate the contract price but sub-clause (2) is not dependant on that. To withhold part of the contract price is within the power of the Secretary. The provision is a direction to him to withhold it; and I think that provision is quite as important as the first one. I think it is quite as important to withhold from the contractor or subcontractor any amount of the contract price which is found, as a result of such renegotiation, to represent excessive profits.

• • •

Mr. Danaher. We amended it so that the contractor had a right—

Mr. McKellar. So that the contractor had a right to sue, and the Government had a right to sue.

Mr. Danaher. And there is not any longer any question in anybody's mind that the contractor does have a right to go into court to determine whether a proper measure of damages, let us say, has been applied in a particular case?

Mr. McKellar. None whatsoever.

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(p. 3653)

Mr. McKellar. Such contracts are in a different situation, and, of course, if the determination is wrong in any way, the contractor will have a right to go before the courts and have the matter adjusted.

• • •

Mr. Taft. Referring again to this controversial section (c), the Secretary is given power—

> to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits.

Will the Senator tell me, found by whom?

Mr. McKellar. The provision does not say.

Mr. Taft. It does not say. That is why I asked whether the Senator can interpret that provision. Does it mean found by the Secretary?

Mr. McKellar. Unquestionably.

Mr. Taft. Or does it mean found by agreement?

Mr. McKellar. In my judgment, the Secretary will agree with the contractor whenever it is possible; but when he makes a finding, a contractor who is dissatisfied with it will have to exercise his right to go into court.

Mr. Taft. It does not do a contractor any good to go into court.

Mr. McKellar. Yes, it does, if he has a just case. If the Secretary of War, for instance, has held certain profits to be excessive when they are not in fact excessive, of course, the contractor has a right to go into court, and I think he will get relief.

Mr. Taft. I do not see why. The Secretary is given absolute discretion to find what are excessive profits. He may say that 1 per cent is excessive, or any amount over 1 per cent. No right is here given the court to overrule the Secretary of War as to what may be excessive profits.

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(p. 3653)

Mr. Pepper. Is there anything in the record of either the debate in the Senate as the Senator recalls it or in the discussions of the conferees that indicates anything in the nature of a standard or a principle which might guide the Secretaries in the administration of this proposed law?

Mr. McKellar. No, sir.

Mr. Pepper. There is no provision as to 6 per cent or 8 per cent?

Mr. McKellar. The Senator, I take it, has reference to a standard fixing a percentage of profits that a contractor may be permitted to make?

Mr. Pepper. Yes.

Mr. McKellar. There is nothing of that kind at all. That was eliminated from the bill, and does not now appear in the bill.

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(p. 3655)

Mr. Overton. • • • My reason for not agreeing to the substitute amendment proposed by the conferees is that

it does not grant one item of authority to the Secretary of the Navy or the Secretary of War or the Chairman of the Maritime Commission which is not already possessed by those officials. It does not give one additional right to the Federal Government which it does not already possess. It does not afford any remedy on the part of the Federal Government against any contractor who is making unconscionable profits which the Federal Government does not already possess. So, while it does not do any good, at the same time I think I can say it does not do any harm. It is merely a restatement of practices which are now being engaged in by the heads of the departments concerned.

The amendment which was adopted by the Senate was an effective amendment; it did give authority to the Secretaries which they do not now possess; it did give rights to the Federal Government which the Federal Government does not now possess. The amendment adopted by the Senate gave the Secretary of each department the right to provide in each contract for the renegotiation of the contract price. It also provided that the contract should contain a clause for the retention by the United States or the repayment to the United States of any amount of the contract price "which is deemed by the Secretary"—I repeat those words—"which is deemed by the Secretary to represent excess profits."

Mr. Walsh. Mr. President, will the Senator from Louisiana yield?

Mr. Overton. I yield.

Mr. Walsh. I gather from what the Senator from Louisiana states that he is disappointed at the provisions of the amendment he has been discussing because there is no yardstick; there is no way for an administrative official or for the public to know where legitimate

profits begin on war contracts and what are and may be construed to be excessive profits. In general, is that the Senator's position?

(p. 3656)

Mr. Overton. No; that is not the contention I am making. The contention I am making is that this amendment does not give any authority to the Secretary which the Secretary does not already possess.

Mr. Walsh. Let me put it this way: Does the Senator know of any existing law which attempts to determine profit limitations, so that the public and the administrative officials may know what is the line of demarcation between legitimate profits and excess profits?

Mr. Overton. There is no law providing any yardstick in that connection.

Mr. Walsh. Let me ask another question: Has the Senator, as a member of his committee, had the experience which I have had of finding the executive officers of the various departments apparently—and I think sincerely—desirous of fixing a limit upon profits, and agreeing with efforts to do so, but unable to furnish any practical proposals which would squarely meet the issue?

Mr. Overton. We undertook to solve that problem in the amendment, which was adopted by the Senate, by vesting authority in the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to determine what are excessive profits. It may be said that that is an improper enlargement of authority, since the Secretary represents the Government, which is one party to the contract, and that one party to the contract should not have the right to determine what are excessive profits. The answer to that is that in the absence of any yardstick—and I agree with the Senator from

Massachusetts that it is very difficult to establish a yardstick by statute—there ought to be some tribunal to determine what are excessive profits, and to determine it speedily. Therefore, the Senate proposed to vest that authority in the Secretaries—constituting a tribunal to determine what are excessive profits.

The other answer is that if the contractor is aggrieved he has his remedy in the courts.

Mr. Walsh. I think we all appreciate the extreme difficulty of drafting legislation dealing with the subject. It has been disappointing to me to find that the officials who are actually making the contracts—those who have had experience under war contracts and those who have knowledge of large profits—have not been able—I do not say they are unwilling—to give us concrete suggestions.

My committee has proposed some amendments and sent them to the Departments, and invariably there has been some criticism, which is understandable, to the effect that such proposals might interfere with the production of war materials. I have not been able to get any constructive suggestion from the Department heads in an effort to solve this problem.

I do not say that in criticism. It is partly due to the fact that the department heads think that this subject is our responsibility. I wish to make it clear that the whole discussion of this subject, in which we are all so vitally interested, has been made difficult for the Congress by reason of the absence of suggestions from the administrative officials and their enthusiastic support of some amendment.

Mr. Overton. I do not think that the substitute amendment proposed by the conferees would be at all effective. I think it would accomplish absolutely nothing, and I shall undertake to show why in a moment.

Mr. Walsh. I regret to say that I share the Senator's opinion that it would not be effective. It would not be strong enough, and it would be disappointing to the American public, although in view of my own experience I think the committee deserves to be commended for making an effort, even if a weak effort, to limit war profits.

Mr. Overton. There was a very earnest effort on the part of the Senate committee, the House committee dealing with the subject, and the conference committee, to undertake to solve the problem. I am simply taking the position that the problem is not at all solved. The solution, if any, still remains to be found.

Mr. McKellar. Mr. President, will the Senator yield?

Mr. Overton. I yield.

Mr. McKellar. Does the Senator say that this provision would not change the law at all?

Mr. Overton. Yes.

Mr. McKellar. I think the Senator is entirely mistaken, because undoubtedly at the present time there is no provision of law for the renegotiation of a contract or the price contained in a contract. This language does provide for legal renegotiation of a contract. That is the main feature of the amendment.

Mr. Overton. Mr. President, it is not necessary for the Congress to vest authority in the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission to undertake the renegotiation of a contract. They already have such authority.

Mr. McKellar. They say they have not.

Mr. Overton. They are doing it now.

Mr. McKellar. The evidence before the committee was that they have no legal authority for it. The Senator recalls the testimony of those gentlemen.

Mr. Overton. They have no mandatory authority. They have no directions from the Congress to do so; but they have the authority to renegotiate contracts.

Mr. Clark of Missouri. Mr. President, will the Senator yield?

Mr. Overton. I shall be glad to yield in a moment. Necessarily they have that authority. The Secretary of War can go to a contractor and say, "I think there are excess profits in this contract. I want to renegotiate it." Can he not do that?

Mr. McKellar. No.

Mr. Overton. Certainly he can. I differ with my colleague.

Mr. McKellar. The contractor can sue the Government to recover the contract price. If there were fraud in the contract the Secretary could defend on the ground of fraud. However, there is no present law—and I challenge the Senator to find any—which provides that the Government has the right to renegotiate the price fixed in a contract.

Mr. Overton. This amendment does not give such authority.

Mr. McKellar. Oh, yes; it does.

Mr. Clark of Missouri rose.

Mr. Overton. Mr. President, I have not had an opportunity to present my argument. . . . .

Mr. Overton. I was referring to subparagraph (b) of the proposed amendment. Subparagraph (c) undertakes to vest authority in the Secretary in the case of all contracts and subcontracts hereafter made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, to renegotiate the contracts. So it undertakes

to give authority to the Secretary of the Department to require the contractor to renegotiate the contract price, and then to withhold from the contractor or subcontractor any amount of the contract price which is, as the Senate amendment had it, "deemed by the Secretary to represent excessive profits," but, as the substitute amendment has it, "which is found as a result of such renegotiation to represent excessive profits." Wherever in the substitute amendment there is any provision for renegotiation or for recovery or retention of excess profits by the Government, they must be such excess profits as are found to be excessive as a result of the renegotiation. Therefore the right of the Federal Government to withhold or recover excessive profits depends entirely on the act of the contractor in signing a renegotiated price contract. If the contractor says, "I refuse to sign the renegotiated contract," it makes no difference how much excess profits he is making; the Federal Government is without any authority whatsoever to modify the contract or to recover the excess profits, although they may amount to 100 per cent or 1,000 per cent, because they do not result from the renegotiation of the contract price. I think that the amendment inserted by the conferees destroys the effectiveness of the Senate amendment.

That view was taken in the House. The able Representative from Georgia (Mr. Vinson), who has made a considerable study of the question of excess profits, as the Senator from Massachusetts (Mr. Walsh) will no doubt agree, saw at once the ineffectiveness of the substitute amendment proposed by the conferees, and he made a statement to that effect. I should like to quote from it. The statement which he made to the House was not disputed by any Representative. It was not disputed by Mr. Cannon, in

(p. 3657)

charge of the conference report. This is what Mr. Vinson said:

> The conferees are bringing before the House a substitute which amends the Senate provision and leaves the question of excessive profits to be determined entirely by mutual agreement of the contractor and of the department concerned through renegotiation of the contract.

I repeat, "by mutual agreement." There must be a mutual agreement between the contractor and the department concerned. Continuing, Mr. Vinson said:

> This is no more nor no less than a restatement of existing departmental practice.

That is true. We know that for some little time the departments have been undertaking to renegotiate contracts, and in some instances have been successful; but the renegotiation of the contract depends entirely on the consent of the contractor to reduce the price. If the contractor will not, as a result of the renegotiation, enter into a contract reducing the price, then the renegotiation is at an end. The amendment now before the Senate contemplates that there shall be no finding of excess profits, and no recovery or retention thereof, unless they result by reason of a renegotiation of the contract price. That makes the whole effort on the part of the Congress to deal with this question in this manner absolutely futile.

Continuing to quote from Mr. Vinson:

> Each department head now has the right and considerable authority to require a renegotiation of any contract on which he believes the contractor is receiving excessive profits.

Mr. Vinson further said:

> The provision recommended by the conferees is definitely not an answer to the problem of exorbitant

profits on war contracts. It may be of some help to the departments in their campaign for voluntary refunding of excess profits by the contractor, but it will go no further than that.

That caused Mr. Tarver to make this observation:

If the gentleman's statement is correct—and I may say I am in full accord with him—then why should the House go through the futile motion of adopting this amendment? Why not reject the whole thing rather than have the people of the country believe we are undertaking to legislate on this question, when we are, in fact, not accomplishing anything?

Mr. McKellar. Mr. President, will the Senator yield?

Mr. Overton. I shall be glad to yield in a moment.

I have no desire at all to defeat this amendment, but I do not wish the public to think that the Congress of the United States has dealt effectively with excess profits by the amendment.

Mr. McKellar. Mr. President, I was about to say that, while it is true that that was Mr. Vinson's language on the floor of the House, yet the House, with practical unanimity, disagreed with Mr. Vinson and passed the bill.

Mr. Overton. I do not know that the House disagreed with Mr. Vinson.

Mr. McKellar. The House passed the bill.

Mr. Overton. I think the Senate will, with practical unanimity, and probably unanimously, vote for this conference report, and so will I; but I will do so not because we have met this problem face to face, or because we have done anything toward solving it. I will vote for the conference report because, first, it will not do any harm, while it will not do any good; and, second, because we have a $19,000,000,000 appropriation tied up with this attempt at legislation on the part of the Appropriations

Committee. So I am not opposing the conference report, and I am not going to oppose the particular substitute amendment we are now discussing.

* * *

Mr. Hayden. Mr. President, will the Senator yield at that point?

Mr. Overton. I yield.

Mr. Hayden. I entirely agree with the Senator that, from the legal standpoint, no contract can be renegotiated except as the result of an agreement between the contractor and the Government. However, will not the Senator concede that there is a positive advantage in affirmatively saying, as we do say in this measure, that any contract written in the future shall contain a provision that it is subject to renegotiation? There is no such law now. That is an advantage. If the measure becomes law, in the future a contractor who makes an original contract will know that if his profits are excessive he will be called upon to renegotiate the contract.

Mr. Overton. That is true; it has a persuasive effect.

Mr. Hayden. I understand that. The second point is that, following enactment of the measure, renegotiation will be by law directed, which again appears to me to be a positive advantage, instead of having no law at all.

Mr. Overton. Yes.

Mr. Hayden. The measure does not take away any of the extra-legal powers which the Departments have had heretofore.

What were the powers which the Departments had to compel the renegotiation of contracts? First, they could say to the contractor—as was done during the last World War by the head of the War Industries Board, Mr. Baruch: "You are making too much money." the contractor would say, "What are you going to do about it?"

It would be pointed out to him that he was engaged in other business, and that he would have great difficulty in obtaining priorities for materials needed in his other business unless he did right by the Government in this instance. That power still exists, and is very persuasive.

Mr. Overton. Certainly; they have that power, and they are exercising it now in the War Department.

Mr. Hayden. Yes; but I say it is better to write it into the law, instead of doing things in an extra-legal way.

A second point is that the Government may owe a contractor money, but it may take its time about paying the money. That is a second persuasive influence upon him.

Another point is that a contractor may have one contract but he may have difficulty in obtaining another one. That is another extra-legal influence.

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(p. 3657)

Those are extra-legal powers which the departments may exercise. Such powers would be in no manner changed by the pending measure; but we affirmatively say to the contractor in the original instance, "We are making this contract with you with the understanding that if your profits are unreasonable you will agree that there may be a renegotiation." On the other hand, the officials of the department who made the contracts are directed; and I think that is a positive advantage.

I think the Senator goes too far when he says we have done nothing; that it is just as though our action were a waste of time and effort. That is not true.

Mr. Overton. I think the argument of the able Senator supports my view, because he goes outside of the amendment in order to show what the secretaries of the different departments may do. They may say to a contractor, "You

are going to be badly treated on priorities." They may say, "We do not expect to give you any other contracts." None of that is in this amendment.

Mr. Hayden. I understand; but the Senator goes so far that I am afraid he will convey to the country the impression that really nothing is done. If the Senator is consistent, he should not vote for the adoption of the conference report.

Mr. Overton. Why not?

Mr. Hayden. Because he says we are doing nothing. Why do a foolish thing?

Mr. Overton. We are doing something. We are appropriating $19,000,000,000.

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(p. 3660)

Mr. Taft. • • •

It seems to me that the provision designated as section 403 (a) in the conference report is subject to every objection that has been applicable to any of the other provisions, plus the fact that it is completely ambiguous. Here is a provision dealing with literally billions of dollars, which is to be operative for years to come, and we cannot on the floor of the Senate agree what it means. If the courts are to decide the question, they will take years to determine what it means. It relates to the most essential feature of the business system, and to more than half of all the business in the United States.

Whether the provisions means granting to the Secretaries arbitrary power, or whether it means nothing, is a subject upon which members of the committee themselves cannot agree. The Senator from Louisiana (Mr. Overton) feels that it means nothing, and that nothing can be done unless a contract is renegotiated and a new agreement

reached with the consent of the contractor. If that be the fact, the whole contract does not mean anything.

I do not agree with the Senator from Louisiana. I agree that the provision is ambiguous. I agree that there are all sorts of possible interpretations. I agree that the question may be litigated for years to come; but it seems to me it is a rather complete delegation of the power, which Congress ought to exercise, over practically the entire business of the United States.

As I read the provision, it provides for renegotiation. Every contract may be reopened on notice from the Secretary. A man who had a contract would no longer have a contract. He must renegotiate. Perhaps he has spent millions of dollars. He would be tied up. He could not stop. He would have to reach an agreement if he expected to obtain any money at all from the United States Government. He would have no contract. If this provision should be enacted no company or individual in the United States could ever have a contract with the United States Government. We should be abandoning the theory of contracts. Any contract might be voided by the Secretary tomorrow, at his discretion. I think that is clear.

Obviously the contractor would be at a disadvantage. The Government would not have to agree to any price. The Government could take over his plant if it did not like what he was doing. I think it is pretty clear that even if there were no other provisions, all contracting with the United States Government would come to an end with this provision. Renegotiation is defined as including the refixing by the Secretary of the department of the contract price. So I believe that even under the direct terms of the bill the Secretary would have authority to change any price to any figure he might deem proper.

My principal objection to the provision is that not only would it delegate completely to individuals—the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission—in their individual discretion, the question of what price shall be paid on any contract, whether they have agreed to any other price or not, but also for 3 years after the war—probably for 8 years from this time—without previous notice to any contractor, the Secretary might suddenly walk into the office of any business concern in the United States and say, "I think you made an excessive profit on this contract back in 1941 and 1942, and you will have to repay to the Government millions of dollars."

As I read the bill it gives powe to the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission, whoever he may be at that time, to bankrupt every concern in the United States which has had any war contracts. That would mean two-thirds of all the companies in the United States of any size whatever. There is no limitation, and no standard whatever is prescribed by which the judgment of the Secretary may be controlled.

(p. 3661)

It is said that the contractor may go into court. Some Secretary of War appointed 5 years from now may decide that 6 per cent was too much; that after all, in a war contract, in view of all the sacrifices, 1 per cent was sufficient. He may demand that everything over 1 per cent be returned. I see no provision here which would enable any court to say that the Secretary was not correct in such an interpretation. There is not the faintest suggestion of a yardstick for excessive profits.

It is said that the procurement officers of the Army and Navy have approved this provision. I understand

why they have approved it. They have approved it because it is a complete delegation of power to them to decide what ought to be done with every contract, and on what basis they shall proceed. It may not be a uniform basis. A new Secretary of War may say, 2 or 3 years from now, "I think 2 per cent is reasonable. The Chairman of the Maritime Commission may adopt an entirely different basis, or he may adopt no basis at all. He may say that 1 per cent is reasonable on a certain contract, and 5 per cent on another contract.

That seems to me to be a perfectly unjustifiable and dangerous delegation of authority by the Congress to individuals, and one which, in my opinion, would entirely remove the incentive motive. Perhaps it ought to be removed; but I do not think that is the present intention or policy of Congress. We all want to prevent unreasonable profits; but it seems to me that with respect to labor, the farmer, and the businessman, there is still the belief that there is a purposed to be accomplished by keeping some incentive to individuals to proceed in behalf of the war effort.

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(p. 3661)

Mr. La Follette. I think my colleagues know that this is a subject in which I have been greatly interested. I hope I may be pardoned if I find myself very much confused about this particular draft, when two such able lawyers as the senior Senator from Louisiana and the senior Senator from Ohio disagree so violently about this particular provision. I think it helps to emphasize the Senator's point that this kind of legislation should never be attempted on an appropriation bill, especially an appropriation bill which is so urgent as is this one."

EXCERPTS FROM "RENEGOTIATION OF CONTRACTS" HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON FINANCE, UNITED STATES SENATE 77th CONGRESS, SECOND SESSION ON SECTION 403 OF PUBLIC LAW NUMBERED 528, ETC.

September 29, 1942.

Statement of Hon. Robert C. Patterson, Under Secretary of War.

(p. 3)

Mr. Patterson. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, providing for the renegotiation of contracts and subcontracts became effective on April 28, 1942.

Section 403 originated in the adoption on the floor of the House of Representatives of the Case amendment to H. R. 6868 (Sixth Supplemental National Defense Appropriation Act, 1942) the purpose of which was to limit the profits on any war contract to 6 percent. For reasons which were fully stated to the Senate Subcommittee on Appropriations, the War Department suggested the elimination of this provision. At the request of the chairman of that subcommittee, Mr. Donald Nelson and representatives of the War and Navy Departments agreed to suggest a substitute method of preventing excessive profits on war contracts.

The suggested substitute which was presented by General Somervell was based on the theory that if every contract price could be reexamined by the parties in the light of actual experience under the contract, it should be possible to eliminate the bulk of excessive profits. No

other compulsion upon the contractor was contemplated than:

(1) To furnish adequate data as to actual and legitimate costs; and

(2) *In the light of such data to bargain in good faith, for the purpose of readjusting the contract price.* It was thought that existing contracts could properly be subjected to such reexamination and the proposal submitted to the subcommittee accordingly so provided. This proposal in effect would have given statutory sanction and implementation to voluntary readjustment of contract prices which was being widely practiced by the armed services prior to the adoption of the Case amendment.

Senator Walsh. The Case amendment was adopted by the House and when the bill came to the Senate, the Case amendment was in it and this section that you are discussing was substituted for the Case amendment in the Senate.

Mr. Patterson. That is exactly right; yes.

Senator Walsh. Senate Appropriations Committee.

Mr. Patterson. Yes.

The statute as finally enacted differed radically from the proposal submitted by General Somervell. In substance, it imposed upon each of the services the duty of eliminating excessive profits by a process of renegotiation. Every contract and every subcontract made by every prime contractor is required to contain a provision for such renegotiation

(p. 4)

without regard to whether in the judgment of the Secretary such a provision was necessary or appropriate.

In other words, it was sweeping.

The term "renegotiation" was so defined *as, in the opinion of many lawyers,* to authorize the Secretary *to refix a contract price regardless of agreement with the contractor or subcontractor. In the light of the legislative history of the act, there may be serious doubt as to whether it was the actual intention of Congress to confer any such power of unilateral redetermination of the contract price, but the words clearly permit of such construction and it has been widely adopted by the business community.*

Finally, the statute seems clearly to contemplate something more than the reduction of contract prices found to be excessive; in cases where excessive profits have already been paid to contractors, a clear duty seems to be imposed upon the Secretary to recapture such profits by various devices suggested in the statute. Thus the statute seems to impose upon the Secretary the duty of recovering excessive profits as well as the duty of reducing unreasonable prices.

(p. 13)

Senator McKellar. Have you an amendment on that point?

Mr. Patterson. Yes, sir. I will come to that.

Senator Vandenberg. May I ask one thing further, Judge?

The complaint was made in the full committee the other day that "renegotiation" is a misnomer in connection with this process because renegotiation infers freedom of action on the part of both parties to the undertaking. What show does a contractor have when he enters renegotiations and when you announce what you think ought to be the renegotiation base?

What would happen if he said "No"?

Mr. Patterson. That is a matter on which the original statute is in some ambiguity.

"Renegotiation" in and of itself imvlies an agreement, mutual agreement.

Now, the provision about recapture that is in 403 may have another significance. You can argue that it means "move in." *I myself believe that renegotiation is mutual.* Of course, we have various weapons we can use. We can, I suppose, cancel the contract and place a compulsory order with the producer at what we call a reasonable price. We can, I suppose, report the case to the people up here as a case to be taken up. We can do that, but I don't think that that is desirable. Or we could withhold future business, on renewal of a contract, from a contractor who had not been what we thought was reasonable on renegotiation.

Senator Vandenberg. I think you have ample weapons to proceed, as I have indicated. I am just wondering, just in cold reality, whether the contractor isn't totally at the mercy of your negotiator's judgment.

(p. 18).

Mr. Patterson. I come now to quite an important amendment, which relates to final agreements.

(4) Final agreements: When a contractor or subcontractor has renegotiated in good faith *and agreed to eliminate any excessive profits found as a result of such renegotiation,* he is clearly entitled to assurance that the matter will not be reopened at a later date. The statute does not provide expressly for any final clearance for liability for excessive profits. The War Department, however, gives clearance for the period covered by the renegotiation, either at the time of renegotiation or after the end of the period, and it is believed that this in the proper construction of the act.

This is obviously of the utmost importance to contractors and subcontractors, and the power to give clearance aids in reaching agreements with contractors. The amendments specifically authorize such final or other agreements for a past or future period. Thus by such an agreement, the secretary may fix firm prices for a reasonable time in the future when he thinks it proper. This matter is so fundamental that it should not be left to interpretation.

We find an attitude on the part of producers fearful of being called back again a year hence to renegotiate for the very period, and the very subjects that have already once been settled by renegotiation. We believe that we ought to give them the assurance that, when we once renegotiate, the matter is closed for that particular subject matter and that particular period.

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War Department Price Adjustment Board.

June 30, 1942.

Memorandum for Commanding General, Services of Supply, Commanding General, Materiel Command, Army Air Forces.

Subject: War Department Price Adjustment Board.

1. The Price Adjustment Board created by memorandum of April 25, 1942, is hereby redesignated as the War Department Price Adjustment Board. It will serve as the coordinating agency of the War Department to determine and eliminate by renegotiation excessive profits from War Department contracts, and subcontracts thereunder, subject to approval by the Under Secretary of War or his designated representative.

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(p.30)

9. All agreements reached as a result of such renegotiation shall be made expressly subject to approval by the Under Secretary of War, or his duly authorized representative, and shall be in such form and accompanied by such supporting reports and documents as he may prescribe from time to time.

10. The manner in which agreements shall be carried out, whether by a reduction of contract prices, refunds, or otherwise, shall be determined by the Under Secretary of War, or his designated representative. Agreement shall be reached with the Navy Department and the Maritime Commission as to any part of the agreement affecting contracts with them.

11. The Commanding General, Services of Supply, and Commanding General, Materiel Command, Army Air Forces, are authorized and directed to create, with the advice of the War Department Price Adjustment Board, Price Adjustment Sections to conduct renegotiations with such companies as may be assigned to them by the War Department Price Adjustment Board, subject to review by the Board and approval by the Under Secretary of War or his designated representative, except in cases where by general instructions or in the particular instance, the Under Secretary or such representative may authorize them to make final agreements.

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War Department.
Headquarters, Services of Supply,
Washington, D. C., July 3, 1942.

SPPDP 020 (7-3-42).

Memorandum for Directors and Chiefs of Staff Divisions, This Headquarters; Chiefs of Supply and Administrative Services, Services of Supply; and Commanding Generals, all Corps Areas

Subject: Price Adjustment Sections.

* * *

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4. All agreements reached as a result of such renegotiation shall be made expressly subject to approval by the Under Secretary of War, or his duly authorized representative, and shall be in such form and accompanied by such supporting reports and documents as may be prescribed.

5. Agreements reached by the Price Adjustment Sections shall be transmitted to the chief of the appropriate Supply Service and, when approved by such chief, shall be transmitted to the War Department Price Adjustment Board for review by the Board and final approval by proper authority, except in cases where, by general instructions or in the particular instance, the chiefs of the Supply Services are authorized to make final agreements.

6. The manner in which agreements shall be carried out, whether by a reduction of contract prices, refunds or otherwise, shall be determined by the Chief, Purchases Branch, Procurement and Distribution Division, Services of Supply.

7. Nothing herein contained shall preclude contracting officers from—

a. Continuing to make adjustments of prices or fees in individual contracts containing an express provision

for redetermination of the price or fee on the basis of a specified formula or containing an express provision that the price or fee shall be subject to renegotiation, whether or not under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

b. Continuing to reconsider individual contracts of any type with a view to adjustment of the contract prices by voluntary renegotiation or to accept voluntary reductions in such contract prices without auditing the accounts of the contractor or subcontractor if the amount is deemed reasonable.

• • •

TI-1171 July 8, 1942.

CONTRACT PRICE RENEGOTIATION

Commanding General,
Materiel Center, Wright Field, Dayton, Ohio.

(p. 32)

c. All agreements reached as a result of such renegotiation shall be made expressly subject to approval by the Under Secretary of War, or his duly authorized representative, and shall be in such form and accompanied by such supporting reports and documents as may be prescribed.

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War Department,
Office of the Under Secretary,
Washington, D. C., August 8, 1942.

Memorandum for Mr. Maurice Karker, Chairman, War Department Price Adjustment Board

Subject: Policy.

1. The following policies will be followed in the operation of the War Department Price Adjustment Board:

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e. The attitude of the Board should be firm but friendly and renegotiations should be conducted in a spirit of cooperation and to require a minimum of time and inconvenience on the part of executives. Requests for information or detail not absolutely essential to the negotiation must be avoided.

• • •

h. In case a company appears to be uncooperative or is unable or refuses to accept a settlement which the Board considers reasonable, the matter should be referred to the undersigned, Special Representative of the Under Secretary of War, for proper action.

(p. 34)

WAR DEPARTMENT

Price Adjustment Board

Principles, Policy, and Procedure to be Followed in Renegotiation

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(p. 37)

IV. Contracts and Subcontracts subject to Adjustment *as a Result of Renegotiation*

V. Renegotiation Procedure

The primary purpose of the renegotiation is to arrive at the prices which would have been agreed upon when the contracts were made if the facts and factors now known had been known at that time. Accordingly, *after an agreement has been reached with a contractor or subcontractor as to the aggregate amount of any excessive profits realized, or likely to be realized, from its prime contracts and subcontracts with other prime contractors, these excessive profits may be withheld or recovered* by the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission in various ways.

• • •

The ultimate test is what would have been a fair profit before Federal and other income and excess-profits taxes. It is for Congress, through the Treasury, to determine how much of that profit should be taxed. Increases or proposed increases in tax rates, while a factor to be considered, should not affect the principles of renegotiation or change the basic consideration from what would be a fair profit before taxes to what would be a fair profit after taxes. To renegotiate on the basis of allowing a company a fair profit after taxes would be tantamount to returning to the company part of what Congress has decided should be its contribution to the war effort.

(p. 40)

VIII. Agreements

All agreements resulting from renegotiation should be in writing signed in behalf of the company by the owner, a partner, or an authorized officer and, in the case of a corporation, accompanied by an attested copy of the authorizing resolution of the Board of directors.

(1) Prohibited Provisions

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(2) Interim Agreements

(p. 41)

(3) Final Agreements

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(4) Illustrative Provisions

(p. 54)

Memorandum—Suggested Amendments to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Renegotiation of Contracts)

1. Definitions

(a) "*Excessive profits.*"—Throughout the present statute the phrase "any amount of a contract price which is

found as a result of renegotiation to represent excessive profits" is constantly used. For convenience and brevity in revised form the term "excessive profits" has been substituted for this phrase, but subsection (a) (4) defines the term as having the same meaning as the phrase for which it is substituted.

(p. 80)

Profit Limitations on War Contracts as Proposed by Hon. Carl Vinson, Member of Congress

HOUSE OF REPRESENTATIVES,
COMMITTEE ON NAVAL AFFAIRS.
Washington D. C., September 22, 1942.

Hon. Walter F. George,
United States Senate, Washington, D. C.

Dear Senator: I have noted with considerable interest recent publicity concerning your proposal to repeal the contract renegotiation authority contained in Public, 528, Seventy-seventh Congress, and to substitute therefor a direct statutory limitation on profits.

It has long been my firm conviction that the only equitable and effective method of limiting profits on war contracts is by means of a direct statutory limitation. The House Naval Affairs Committee has devoted considerable thought to a bill containing such a provision which I introduced but which the committee, after extended hearings, failed to report because of other controversial matters contained in the same measure. I am sure that a bill dealing solely with the matter of a limitation on war profits would have been enthusiastically received by the House.

At the time Public, 528, was before the House I pointed out the injustice of conferring on the various department heads the arbitrary and unlimited authority to limit profits

on war contracts by renegotiation, and the uncertainty which would result from such a provision, and expressed the hope that such renegotiation authority would soon be superseded by legislation setting out statutory standards defining reasonable profits on war contracts.

It is my feeling that the renegotiation provisions of Public, 528, makes any contract with the War or Navy Department ineffectual and illusionary.

I am enclosing for your study a copy of H. R. 6790 (Committee Print No. 2), which embodies the result of the time and thought devoted to the problem by myself and by the House Naval Affairs Committee. I hope that it may be of some help to you in connection with your present proposal.

With kindest regards, I am

Yours very truly,

Carl Vinson, M. C.

(p. 92)

Mr. Eichholz. As we see it, Mr. Chairman, the problem that this committee is faced with is a broader problem than that of taxation and profit limitation.

I might illustrate by a very simple example. Suppose that two different contractors are making the same item for the Army or the Navy and it costs one contractor a thousand dollars to make that item and it costs the other contractor $800 and the first contractor makes a 4-percent profit, and the second contractor makes a 10-percent profit. Even though the second contractor is making a much larger profit, the net cost to the Government is much less in the case of the second contractor. In other words, profits are only one of the items of cost that go into paying for the munitions necessary to win the war.

EXCERPTS FROM

RENEGOTIATION OF WAR CONTRACTS HEARINGS BEFORE THE COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES SEVENTY-EIGHT HOUSE OF REPRESENTATIVES SEVENTY-EIGHTH CONGRESS ON H. R. 2324, H.R. 2698 and H.R. 3015, etc. SEPTEMBER 9, 1943.

(pp.1-2)

Statement of Hon. Maurice Karker, Chairman of the War Department Price Adjustment Board and Director of the Renegotiating Division of the Army Service Forces

I would be glad to make an oral statement as briefly as you choose to have me and then, of course, be available for whatever questions members of the committee would like to ask.

I am chairman of the War Department Price Adjustment Board and have been since July 1942.

Renegotiation is a statutory requirement under section 403 of Public, 528, adopted on the initiative of the Congress largely taken by Mr. Case in the House and Senator McKellar in the Senate, with the cooperation of the Departments, and presumably as a result of the disclosure of industry practices and profits early in 1942, following the beginning of the war, and carrying on from experience in the defense program.

In my judgment as an individual, it is a dangerous and un-American statute, but we are in a dangerous and destructive war which justifies unusual precautions and conditions.

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It was unbelievable a year ago that it would be possible for the War Department to conclude more than 4,000 agreements under this statute without having had to resort even once to a unilateral determination. Every agreement so far reached under the statute by the War Department has been a bilateral agreement. And by that I do not mean to be unrealistic or to fail to note the fact that the powers of negotiation are on the side of the Government; that the power of the statute is with the Government negotiators; but I do mean to make the statement as a tribute to the farsightedness and patriotism and common sense of the men who have represented industry in their renegotiation.

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Most of these major suggestions have been treated in previous statements which I have made to committees of the Congress, and I should like to refer to the statement before the subcommittee of the Committee on Appropriations of the House of Representatives on the Military Establishment appropriation bill for 1944, beginning on page 483 of the hearings for Tuesday, June 1, 1943; secondly, to the statement before the Committee on Naval Affairs, House of Representatives, in the investigation of the progress of the war effort, beginning on page 991 of the hearings, Wednesday, June 30, 1943.

Mr. Gearhart. Would it not be proper to incorporate the testimony to which Mr. Karker has made definite reference in the record? I suggest that we incorporate it at this point.

The Chairman. Without objection, it will be done.

(The above-mentioned statements are as follows:)

Statements of Maurice Karker, Chairman, Price Adjustment Board, War Department, and Col. A. J. Browning, General Staff Corps, Director, Purchase Division, Army Service Forces, Before the Committee on Appropriations of the House of Representatives on June 1, 1943.

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Percentage of Profit Allowed Contractors

Mr. Case. In the case you have cited did you leave this company you referred to with any profit?

Colonel Browning. We left them with 20 percent profit, which was one of the highest profits we have allowed.

Mr. Powers. Twenty percent gross?

Colonel Browning. Before taxes.

Mr. Powers. How much did you leave them net?

Colonel Browning. That is very difficult to determine up to now under the Revenue Act of 1942. Generally, the reason we allowed them some 20 percent profit was that the price we finally got was $250 as against the next lower price of $330 and the next price of $400. We have allowed the lowest cost company 20 percent profit, the next 13½ percent profit, and the next one 4 or 5 percent profit.

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Data on Profits of Certain Large Concerns Before and After Renegotiation.

Mr. Mahon. Of the 1,700 contracts which you have renegotiated, in what number of them have the profits before taxes been as much as a million dollars?

Mr. Karker. I do not know. We will have to get you that figure and put it in the record.

(The matter referred to is as follows:)

"Approximately 415. A detailed check of approved cases shows the following proportions having net income before taxes but after renegotiation of the amounts tabulated.

"Less than $100,000, 27.5 percent.

"Between $100,000 and $250,000, 20.3 percent.

"Between $250,000 and $500,000, 16.4 percent.

"Between $500,000 and $1,000,000, 10.8 percent.

"Over $1,000,000, 25.0 percent.

Mr. Mahon. Do any of them run as much as $50,000,000?

Mr. Karker. Before taxes or after?

Mr. Mahon. After.

Mr. Karker. Yes; one company now earns 88 or 89 million dollars before taxes and 28 to 30 million dollars after taxes, after our recovery of 76 million of excessive profits in 1942.

Mr. Mahon. Is that one of the larger concerns?

Mr. Karker. Yes.

Mr. Mahon. Will you put in the record, not the same, but some of the higher incomes, giving us some details?

Mr. Karker. Yes.

(The matter referred to is as follows:)

1942 data on 11 large companies before and after renegotiation

Company, percentage of sales renegotiable, amount of recovery	Over-all net sales	Over-all net profit before taxes		Over-all net profit after taxes	
		Amount	Margin on sales	Amount	Margin on sales
			Percent		*Percent*
A. 78 percent ($76,000,000):					
Before	$536,930,191	$164,082,820	30.5	$47,801,762	8.8
After	460,930,191	88,082,820	19.1	33,361,762	7.2
B. 79.9 percent ($65,400,000):					
Before	457,331,000	126,106,000	27.6	29,935,000	6.5
After	391,931,000	60,705,000	15.5	13,652,000	3.5
C. 97.3 percent ($9,300,000):					
Before	380,221,000	45,867,000	12.1	13,154,000	3.5
After	370,921,000	36,566,000	10.1	10,597,000	2.9
D. 16.5 percent ($21,900,000):					
Before	996,751,292	155,384,284	15.6	47,774,197	4.8
After	974,851,292	133,484,284	13.55	41,137,197	4.2
E. 27 percent ($14,050,000):					
Before	221,560,000	77,570,000	35.0	27,273,000	12.4
After	207,510,000	63,520,000	30.6	24,603,000	11.8
F. 46 percent ($9,300,000):					
Before	361,993,500	43,943,590	12.1	18,881,129	5.2
After	352,693,500	34,643,590	9.8	15,481,129	4.4
G. 79.4 percent ($48,632,000):					
Before	2,250,549,000	297,685,000	13.2	[1]165,754,000	7.4
After	2,201,887,000	249,023,000	11.3	156,508,000	7.1
H. 55.4 percent ($46,500,000):					
Before	491,160,000	101,010,000	20.5	23,200,637	4.7
After	444,660,000	54,510,000	12.2	14,365,637	3.2
I. 94 percent ($34,352,041):					
Before	269,267,401	63,372,003	23.5	14,471,850	5.4
After	234,950,360	29,019,962	12.4	7,944,962	3.4
J. 89 percent ($128,208,005):					
Before	671,361,996	187,976,430	28.0	45,353,634	6.7
After	543,193,991	59,768,425	11.0	20,994,113	3.9
K. 70.4 percent ($53,000,000):					
Before	540,274,551	124,916,140	23.2	32,384,351	6.0
After	487,274,551	71,916,140	14.7	22,314,351	4.6

[1]Estimated.

Procedure in Renegotiation of Contracts

Mr. Powers. Let me see if I understand this renegotiation procedure properly. When you start renegotiating with a corporation or an outfit and they refuse to renegotiate or to abide by your findings, then you submit that to the Secretary of War for his finding?

Mr. Karker. We will prepare a determination but we have never done that yet. We would prepare a determination which would list the various factors affecting that company, with its background and its record in 1942, with its tax and fiscal determination.

Mr. Powers. You submit that to the Secretary of War?

Mr. Karker. To the Under Secretary, by delegation from the Secretary, and he will consider, and if approved, sign that, and that becomes an order upon the contractor.

Mr. Powers. Suppose he does not abide by that?

Mr. Karker. Then we will sue.

Mr. Powers. He has the right to go into court?

Mr. Karker. Yes, sir.

Mr. Powers. And the court decision is final?

Mr. Karker. Yes, sir.

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Mr. Karker * * * There has been a suggestion that there be measurement of excessive profits by fixed formula. In our experience any formula for the measurement of the excessiveness of profits resulting from prices which were originally too high, is completely impracticable and impossible in justice and in equity. It has previously been found impossible by this committee in taxation, a field heretofore susceptible of quite definite measurement by formula, in the provisions made in the Revenue Act of 1942 for the relief of particular situations under the excess-profits tax. It is much more difficult to make provision by formula for a renegotiation, for a determination of a pricing level, although there is entire willingness to consider any specific formula proposed, and to contribute to the effort to develop it.

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It is significant, I think, that up to now, some 16 months after the passage of the statute, there has been no unilateral determination in the War Department. It would be a mistake, however, to assume that unilateral determina-

nations will not be necessary, because I am satisfied that they will be necessary. All men cannot be induced by any means of which I am aware to agree even to that which is in their interest. The money nerve is an exposed and sentitive one, and men react violently and vociferously when it is touched.

There is inability on the part of many to see any distinction between the right to profit from the use of private capital and the right to equal profit from the use of public capital. It is probable that the profit allowances before the repayment of excessiveness will grow less as time goes on, and as the risks of war production can be more accurately determined, and as they are reduced. But it is perfectly clear, I am advised, and I am personally convinced, that in the event of unilateral determination without the agreement of representatives of the contracting company, there is the right of appeal to the courts by any corporation, partnership, or individual who considers himself aggrieved or mistreated.

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Mr. Robertson. What are the present limitations upon an appeal from a departmental decision?

Mr. Karker. The statute is silent. I am advised by counsel that the right is inherent.

Mr. Robertson. But don't you have like most bureaus, the protection that your findings of fact are conclusive?

Mr. Karker. Major, I am not a lawyer. I think you will find counsel a better witness. Our counsel of the Board, Mr. MacIntosh, is present. If you do not object, I would like him to answer the question.

Mr. Robertson. I will be glad to hear Mr. MacIntosh.

Mr. MacIntosh. I think that to the extent that they

are supported by substantial evidence they would be accepted by a court on appeal; but that would not justify, of course, arbitrary findings not supported by adequate evidence.

Mr. Robertson. Is there anything in the statute itself on the subject?

Mr. MacIntosh. There is nothing in the statute whatever dealing with the subject of appeal or the effect of the findings or determinations of the boards.

Mr. Robertson. Then why would they not go into court on the same basis as any litigant, on the facts?

Mr. MacIntosh. I think they would; but the general principle is that the findings of an administrative body such as this are entitled to support unless there is no corroborative evidence.

Mr. Robertson. The reason I raised the question is that I was told some thought that the right to go into court was a nominal right; that contractors could not get anywhere against the Government in court, and that therefore they would try to settle with the Government.

Mr. MacIntosh. I think they would have a substantial burden to overcome in the event of an appeal.

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Mr. Robertson. What is the difference that you would allow in those cases?

Mr. Karker. It is impossible to measure accurately the weighting giving to any one of the factors taken into account, because the number is multitudinous. They are all present in some cases, but the same ones are not present in any two cases. But there is, in justice or equity, a difference depending on the source of the capital, particularly when you relate the profit to the production with that capital and consider the source to which that

profit will be distributed in relation to public capital on the one hand or private capital on the other.

Mr. Robertson. I remember a case in which one manufacturer was allowed 22 per cent above cost, and a competitor in the same line of business was allowed 10 per cent above cost.

Mr. Karker. That may well be true.

Mr. Robertson. I was just wondering if that was the difference between private and public capital or whether it was the difference between the agencies in the War Department that handled the job.

Mr. Karker. It was not the difference, because I am afraid, in that instance—and I cannot identify exactly the two, but I think in that instance the public capital was the one which was allowed the 22 per cent and the private capital the lower figure. The difference in individual approach—the competence, the experience, the conclusions of the people who conducted the renegotiation—may have had some influence. But I think the major difference in those two cases was in the costs of production—the date and the speed with which the one firm started its competence as an armorer, the importance of its production to the arming of the country for war at the time of its maximum peril, when there was imperative need for .30 and .50 caliber machine guns.

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Mr. Disney. Now, in your comments on your regulations you state that Congress prepared the definition of excessive profits. I have not had a chance to see your regulations; but, believe it or not, the Congress defined "excess profits" as follows:

> The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

Is there some excuse for that? Let us go into that a little. We are working a 20-hour day here, and you say you are working a 16-hour day.

Mr. Karker. I am sure that was recommended in perfect good faith by counsel at the time. I was not here, but I was told that it was so recommended to the Congress.

Mr. Disney. Anyhow, you have no means of determining what excessive profits are except the judgment of the man who is handling the job?

Mr. Karker. That is right, sir; and the basis of their character and background and experience and judgment.

Mr. Disney. Now, you, as head of this Board, I judge from your personality, are an important element in the determination of policies. Of course you advise with others, but the initiation of ideas and policies emanates from you personally?

Mr. Karker. I take the responsibility for them, and I have had a great deal to do with their formulation and statement.

Mr. Disney. And you have advocated what you believe to be correct policies?

Mr. Karker. That is right, sir.

Mr. Disney. Now, suppose you should retire. Some other personality would have to take your place. Suppose his ideas about policies should vary widely from yours; then this statute would operate according to his judgment, or even his whims or notions, possibly. Is not that the danger under this statute?

Mr. Karker. That is a danger, but I think it is not a very acute one, because the policies are pretty well established in use in the minds of the organization, in the consciousness of industry, and because the policies, and any change in them, must be personally approved by the Undersecretary of War.

Mr. Disney. Still that remains a personal judgment, not according to any statute or formula?

Mr. Karker. That is correct, sir.

Mr. Disney. And the citizen, either corporate or personal, has to do the best he can under those circumstances and take his chances?

Mr. Karker. Well, but he is a party to the renegotiation.

Mr. Disney. That is what I mean. I do not mean in an ex parte hearing.

Mr. Karker. No, sir.

Mr. Disney. Now, what remedy does he have if he feels he is aggrieved?

Mr. Karker. He should not agree.

Mr. Disney. But what remedy does he have if he feels that he is

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aggrieved?

Mr. Karker. If he feels he is aggrieved, he should not enter into a bilateral agreement.

Mr. Disney. But you do not understand me. Suppose he does enter into the bilateral agreement, and he feels that the decision is incorrect, and wants redress of that grievance. What right has he?

Mr. Karker. I do not know. Of course, so far as I know, he has none.

Mr. Disney. He has none?

Mr. Karker. But I would ask a counter question: Why should he execute an agreement with which he does not agree, in which he thinks he is aggrieved and has been mistreated? He need not do that.

Mr. Disney. I am asking questions now, Mr. Karker.

What I want to get at is, Does he have a right to appeal from a decision by the Board?

Mr. Karker. Oh, certainly.

Mr. Disney. To what court?

Mr. Karker. He appeals first to the Under Secretary of War. If the representative of a contracting company or an individual meets with one of the district boards and fails to agree with them, feels that their judgment is all wrong and that they are taking much too much away from him, he in turn goes to the chief of that service. If he continues to disagree, he may go to the War Department Board, and he is still under no compulsion to agree.

If he still feels that he is mistreated, and we cannot convince him otherwise, he is allowed a hearing by the Under Secretary of War, and if he still continues to feel that his interests are being mistreated, that his rights are not being properly recognized, he would then require —this has never happened, but this would be the procedure from there on—require the Under Secretary of War to issue a unilateral determination, from which an individual has the right of appeal to the courts, according to my advice.

Mr. Disney. What courts?

Mr. MacIntosh. The Court of Claims, sir.

Mr. Disney. If that is done, is there jurisdiction?

Mr. MacIntosh. I think that most counsel that I have discussed the matter with feel that there would be jurisdiction.

Mr. Disney. Now, if he does get into court, what does he have, if the findings of the Under Secretary are conclusive?

Mr. MacIntosh. There is nothing in the statute that

makes those findings conclusive. There would, of course, be a presumption in favor of administrative findings, as there is in connection with all administrative determinations.

Mr. Disney. Where is the law that covers that? Is there any presumption that the findings of any administrative board or body is conclusive?

Mr. MacIntosh. Perhaps we can put it this way: Under the statute the Secretary is directed to eliminate profits which he finds to be excessive, so that then there would be a burden of proof upon the person who attacked that finding of showing that it was an improper and unjustified finding.

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Statement of Kenneth H. Rockey, Chairman, Price Adjustment Board, Navy Department

Mr. Rockey. Thank you. This statement is an outline of the organization procedure, policies, and accomplishments of the Price Adjustment Board of the Navy Department in the renegotiation of war contracts.

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If an agreement is reached as to what the settlement should be, a contract is prepared and submitted for approval to the Under Secretary of the Navy, who is also sent a summary of the facts in the case. If a contractor should be dissatisfied with the suggested settlement of the Board, the facts are submitted to the Under Secretary of the Navy for such action as he may take.

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Mr. Rockey. If a mutually satisfactory agreement as to a reasonable amount of profit to be made on that business is not arrived at between the contractor and the Price Adjustment Board, the matter is referred to the Under-Secretary of the Navy. The contractor has certain relief if he does not agree with the Board or with the final determination of the Under Secretary.

Mr. Knutson. Well, of course, where all the agreements were entered into amicably and without any duress whatever, that would be one thing. But where they are obliged to accept a settlement, that is another thing; because, after all, the Government can say whether it will have material in the future, and probably shut off their credit through the Federal Reserve; there are so many ways that the Government has of bringing pressure.

Mr. Rockey. I know of no cases where such pressure has been brought.

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